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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 867

CHARLES JOSEPH BATTAGLIA, JR.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Charles Joseph Battaglia, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 4, 1967.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported and is provided as Appendix "A" hereto.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 4, 1967. By order dated October 24, 1967, the Honorable William O. Douglas extended the petitioner's time in which to file a petition for a writ of certiorari to and including the 2nd day of December, 1967.

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

(1) Does the removal of a single pool table from the corner of a local bowling alley because of threats sufficiently obstruct or affect interstate commerce so as to justify the invocation of Federal criminal sanctions under the Hobbs Act where the table was purchased locally although of out-of-state manufacture; in such a circumstance is there not a failure of proof of a Hobbs Act offense?

(2) Where the Government admits extensive and pervasive eavesdropping directed against a defendant, is it not error for the District Court to refuse to permit the defendant to explore the authorization and detailed nature of the admitted bugging and to refuse to permit counsel to endeavor to develop the existence of bugging which has not been disclosed by restricting counsel to inquiry as to whether the Government's trial evidence was derived from the Government's admitted bugs?

(3) Does not any electronic intrusion by police agents into the confidential relationship between the target of a police investigation and his attorney, who later represents him when the indictment is filed, presumptively require reversal, and therefore did not both the District Court and the Court of Appeals err in holding such intrusion harmless unless it developed evidence which the Government adduced at the trial?

(4) In addition to the suppression remedy, should not this Court in the exercise of its supervisory powers over

the administration of Federal criminal justice bar absolutely the prosecution of any offense which the Government has sought to discover by the planting of secret microphones in a man's home as part of a pervasive electronic surveillance?

The Statute and Constitutional Provisions Involved

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Title 18 of the United States Code, Section 1951 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c.645, 62 Stat. 793.

Statement

Petitioner was convicted of violating the Hobbs Act (Title 18 United States Code, § 1951) by extortionately obtaining "space" and a share of the profits in a single coin-operated pool table (Indictment C.T. 4).* The Government's bill of particulars (C.T. 22) and indeed the opinion of the Court of Appeals make it clear that the case turns upon "a coin-operated pool table" (Appendix A, *infra* 2a-6a).

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* C.T. refers to the transcript prepared by the Clerk of the Circuit Court of Appeals of the indictment, motion and other documents, which was designated as Volume I of the record in the Court of Appeals; R.T. refers to the reporter's stenographic transcript of the trial which is in two volumes and covers the proceedings of January 11, 19 and 20, and is numbered consecutively; R.H. refers to the reporter's transcript of the hearing on the defendant's motion to suppress in connection with the electronic eavesdropping which took place on January 16 and 18.

On the 17th of February 1967, the Hon. William N. Goodwin, who had heard the case without a jury, sentenced Battaglia to ten years imprisonment and a fine of ten thousand dollars. Battaglia is at liberty on bail.

A special circumstance in connection with the trial of this case arose when on the proverbial eve of trial the Department of Justice came forth to reveal to the Court that it had just learned of the use of extensive trespass electronic surveillance, or "bugging", of the defendant Battaglia at his home, his place of business, a motel where he stayed briefly and an apartment which he sometimes visited.

We reserve to our treatment of the Reasons for Granting the Writ a more detailed statement of the necessary facts. However, no fair understanding of the case may be had without noting at the outset what is implicit but evident throughout the entire course of the proceedings and what became part of the record during the pre-trial hearing on the so-called bugging: Battaglia's name appeared on a list which made him, as one of the FBI agents in the case testified, a target of their efforts to develop a criminal case against him. The heart of our contention is that that zeal resulted in a conviction which, however satisfying to the compilers of the list, cannot be squared with the Constitutional standards for the fair and orderly administration of justice which regulate the conduct of criminal investigations and trials in the Federal courts.

Reasons for Granting the Writ

A. The scope of the Hobbs Act and the failure of proof against the appellant require reversal.

Taking the Government's proof in the light most favorable to it, and indeed adopting for the purposes of the petition in its essential outline the statement of the facts set forth in the opinion of the Court of Appeals, Appendix A, *infra* 1a-4a, we find that in essence Battaglia, through the vehicle of Tucson Vending and Amusement Company, placed certain vending and amusement machines in a bowling alley operated by one Greenwell, the Government's principal witness and the victim of the alleged extortion. The proprietor of a cocktail bar concession installed an apparently very profitable coin-operated pool table device and thereupon persuaded Greenwell to go shares on the purchase of another table which was placed in the bowling alley proper. Battaglia and Greenwell remonstrated and Battaglia allegedly threatened Greenwell and his wife. The cocktail lounge operator was unwilling to go along with the understanding reached after the argument between Greenwell and Battaglia to the effect that Battaglia was to purchase the pool table and thereafter share in the profits, and thereafter the pool table in the bowling alley was slashed. After the slashing the pool table was removed and replaced with one from Tucson Vending and Amusement Company. Put in another way, Battaglia and Greenwell had a commercial understanding about vending machines to be placed in the bowling alley and it was the Government's proof that Battaglia effected the removal of the single controverted machine by the use of threats. Both the machine which was removed and the machine

which replaced it were ordered from sources within the state, though their original manufacture was clearly outside the state.

We think an important and broadly significant point is raised as to the extent to which the Federal government may intervene to punish local extortions on the basis of some speculative, hypothetical or de minimus effect on interstate commerce. It can hardly be argued seriously that a robbery in which a gold inlay is knocked out and a wristwatch stolen violates the Hobbs Act, even though the gold came from interstate or foreign commerce and would have to be replaced from an ultimately interstate or foreign source; nor would the fact that the watch was of Swiss origin and perhaps of greater price than the pool table here justify a Federal intervention.

In *Stirone* v. *United States*, 361 U.S. 212 (1960), this Court, while deciding the case on grounds of variance, found "difficult" the question of resting a Hobbs Act conviction upon the interference of construction of a steel mill which would, when completed, send its product into the stream of interstate commerce (*Id.* at 215). In so doing we think the Court perforce lent great weight to the language of Judge Hastie in the court below when he wrote:

> 'The extortionate threat was made against a local supplier of mixed concrete. It is entirely speculative whether or not preventing this single materialman from furnishing mixed concrete on the construction job he was serving would have affected even future interstate commerce. Was concrete in abundant or short supply? Were there other materialmen ready and anxious to supply without delay the concrete needed for the job? The record tells us noth-

ing. But without some proof that the loss of this supplier would in fact have some delaying effect on the eventual productivity of the mill, any suggested ultimate effect even on interstate commerce several steps removed is speculative to an extreme degree. It is true that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." See United States v. Women's Sportswear Mfgs. Ass'n, 1949, 336 U.S. 460, 464, 69 S. Ct. 714, 716, 93 L. Ed. 805. But this figure of speech carries with it the idea that the "squeeze" must be real and the "pinch" uncomfortably perceptible.

On the present record no more can be said than that what was done to an entirely local business might conceivably have future impact on commerce. Most certainly not even a likelihood of actual impact upon interstate commerce can properly be said to have been proved beyond reasonable doubt. Yet that at least was the burden the government undertook to bear in this criminal case.

Finally, it should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary and partially duplicating federal superimposition on state law enforcement. In view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction. See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 1948, 13 Law and Contemporary Problems, 64, 70. We should insist

> that federal jurisdiction be clear before imposing federal sanctions in an area of primarily local concern.' (*United States* v. *Stirone*, 262 F. 2d 571 [3rd Cir., 1958] at 579.)

This case does not involve the traditional Hobbs Act labor violation nor a racketeering scheme turning upon the proceeds of interstate television broadcasts of sporting events as in *Carbo* v. *United States*, 314 F. 2d 718 (9th Cir. 1963). Mr. Greenwell's business, the Diamond Pin Lanes bowling alley was located on a side street in Tucson and the business was, in his own phrase, "Tusconian" (R.T. 157). We think the ambit of the Federal anti-racketeering statute is a question of wide importance to the administration of justice. We respectfully submit that in this case the Government has pushed its criminal jurisdiction beyond the scope of its statutory authority in order to "get" someone whose name appeared on a list prepared somewhere within the police functions of the Department of Justice. Lists of undesirables prepared by secret police agencies do not have so notable a history of contributing either to freedom or law and order. We respectfully urge that convictions which grow out of such lists deserve especial scrutiny.

B. The violation of Battaglia's Constitutional rights by the Government's trespass electronic eavesdropping and the failure to accord him a proper hearing or extend to him an adequate remedy require reversal.

1. The Background; The Hearing; The Government's admissions; the perjury of FBI Agent Johnson; the choking off of the inquiry into the details of the admitted bugging and the efforts to disclose non-admitted bugging.

On January 11th, just before the trial was scheduled to open, Mr. J. F. Cunningham, a Department of Justice attorney, disclosed to the Court and counsel the existence of trespass electronic surveillance in connection with the case. (R.T. 6-28) Accordingly the matter was set over until January 16th, at which time a hearing was set on a motion made by the defendant (R.T. 63) to dismiss the indictment and to suppress any direct or indirect fruits of any illegal bugging and alleging violations of the defendant's Third, Fourth, Fifth, Sixth and Ninth amendment rights. At the opening of the hearing, Mr. Cunningham, who handled this aspect of the case, after reviewing the statement of the Solicitor General and the policy of the Department of Justice, told the Court:

> "Acting upon that, Your Honor, the Criminal Division was first notified that there had been microphone surveillances in this case on Friday a week ago, January 6th. The Organized Crime Section on Monday obtained the logs that had been made in connection with the surveillances and I reviewed those on the following day on Tuesday, January 10th. Immediately thereafter I left for Tucson in order to bring that to the attention of the Court and the defense counsel, which I did on the morning of January 11th. At that time I made those facts

known to the Court and to the defense counsel, and the defense then filed an oral motion to suppress, in connection with which the Court ordered the Government to turn over to the defendant the logs of the conversations that had been written in the case, and which the Government then did. At that time we conceded and we do concede that the microphones were installed by trespass at the following locations: First, at the residence of Joseph Harley Hootner, Apartment E, 930 North 7th Avenue, Tucson, Arizona, and they were operating from the period January 23, 1961, to March 13, 1961. Such microphones were also installed at the Travelodge Motel, 7370 Sunset Boulevard, Los Angeles, California, and were operated on the two day period January 12 and 13 of 1962. Such microphones were also installed at the residence of the defendant Battaglia at 1938 West Lester Street, Tucson, Arizona, and operated for the period from May 25, 1962 to October 1, 1962, and from May 9, 1963 to August 12, 1963. They were also installed at the Tucson Vending & Amusement Company, 6541 East Tanque Verde Road, Tucson, Arizona, and operated for the period June 18, 1964, until August 7, 1964. Likewise installed at the Tucson Vending & Amusement Company at 2717 East Grant Street, Tucson, Arizona, and operated during the period from September 23, 1964 to November 20, 1964. In connection with these installations, Your Honor, we are informed they were installed on the general authority of the Attorney General, and that they were operated in connection with the FBI's continuing inquiry into organized crime and under the belief that organized crime was being conducted on those premises." (R.H. 20-22)

As we shall demonstrate, the Government took the position that its inventory of its own wrongdoing was binding and conclusive. So that our point is perfectly clear: we believe that the statements made by the attorneys of the Department of Justice reflected their knowledge, as far as it went. Thus Mr. Cunningham told the Court, "There are no tapes" (R.T. 21) and in its written reply to the defendant's motion to suppress, the Government flatly stated: "No tape recording or other original record of these words were made" [referring to words overheard by trespass microphone surveillance] (C.T. 70). If our complaints about the restrictive scope of the hearing really turned upon the exercise of no more than a ceremonial and plainly fruitless right of inquiry, we would still urge that a thorough adversary testing of the Government's conduct is required. Here, however, the perjurious testimony of FBI agent Johnson makes it clear that the police agents, at least, of the Department of Justice were anxious that the full truth should not see the light of day. We let that testimony speak for itself and leave it to this Court whether our characterization of Johnson's testimony as perjurious is a fair one.

Agent Johnson testified:

"A. Yes, sir.

Q. There was no recording equipment? A. No, we did not record it.

Q. At that time? A. No.

Q. Did there come a time when you did record? A. No, we have no tapes.

Q. You did not record it? A. No, I don't recall having recorded any.

Q. Do you have tape equipment for this purpose? A. I don't have any, no."

* * * * *

"Q. (By Mr. Krieger) There is a reference in defendant's Exhibit D in your handwriting? A. Yes.

Q. Is it not? A. Yes.

Q. New tape No. 4? A. Yes.

Q. Am I right? A. Yes.

Q. Was there any tape recording of that conversation? A. No, for the reason that—I can explain as to the tape.

The Court: Go ahead and explain.

A. As to the tapes. We had tape recordings, tape making equipment at the time. However, it did not function, it did not record properly.

Q. All right. How many times did you make tape recorded transcriptions of conversations intercepted in Battaglia's home— A. I didn't—

Q. One moment, let me finish the question. How many times did you make tape recorded or attempt to make tape recorded transcriptions of conversations in Battaglia's home which did not come out? A. I don't remember.

Q. How many times did you try? A. I couldn't tell you exactly the number of times.

Q. Where are old tapes, 1, 2, and 3? A. Probably didn't work, to the best of my knowledge.

Q. You don't know? A. No, There were no tapes.

Q. There were what? A. There were no tapes that were working you could record the conversation.

Q. Where is that equipment? A. I don't know.

Q. What kind of equipment was it? A. You mean —

Q. What was the tape equipment? A. Well, I don't know what the name of it was.

Mr. Cunningham: Your Honor, what difference does it make? They made no tapes. What difference does it make?

The Court: Let him go ahead.

Q. (By Mr. Krieger) What kind of equipment was it? A. I don't know.

Q. Who checked it out? A. Checked it out as to its working?

Q. Yes. A. When I was handling it, I was checking it and it didn't work.

Q. It didn't work? A. No.

Q. So you kept changing tapes? A. Right.

Q. And you wrote down on your log, "A new tape."? A. Right." (R.H. 76, 81-84)

An investigative clerk of the FBI, one Cornet, a fellow listener on the eavesdropping, testified that the tape machine in the Tucson office of the FBI had not worked since 1961 and that nobody had bothered to fix it. Thus according to the Government, during the periods between January of 1961 and August of 1964, when the Government was conducting admitted electronic surveillances of the Battaglia home, business and associates, the tape recording machine remained useless and inoperative. It was an artifact, an objet d'art gracing the Tucson offices of the FBI. This was not a satisfactory state of affairs for Agent Johnson must have wanted to use the machine since he put four different tapes on it in an effort to make it go. Nevertheless the FBI could not mount over that period a technical effort sufficient to repair its tape recorder. We know, of course, from *United States* v. *Black*, 385 U.S. 26 (1966), that the Solicitor General has told this Court of a case in

which the Federal police displayed the technical ability to both make and erase tape recordings.

The scope of counsel's inquiry was sorely limited. This Court in its memorandum in *Black* v. *United States,* 384 U.S. 983 (1966), sought from the Government the following, among other kinds of information: the kind of apparatus used by the Government; the person or persons who authorized its installation; the dates of installation; the use made of the information. At the hearing in the District Court the Court foreclosed an inquiry into the authorization:

> "The Court: Just a minute, counsel. What you want to know is who authorized this particular eavesdropping and I say what materiality that has, I say go on to something else. There is no materiality who authorized this . . ." (R.H. 91-92)

The Court adhered to that ruling (R.H. 93-99), even though it did permit Agent Johnson to testify that he was not the one who authorized the installation (R.H. 125). Petitioner's counsel was blocked from an inquiry into the physical nature of the installation or the location of the surveilling microphones (R.H. 169). The petitioner was prevented from offering the testimony of one Jimmy G. Adcock, a former sergeant of the Tucson police department intelligence unit, who would have testified that an Agent Flynn of the Tucson FBI office, since deceased, had told him during the course of their joint surveillance of Battaglia of the existence of trespass electronic surveillances of Battaglia at locations other than those admitted by the Government. The Government successfully blocked this on the wholly erroneous basis that if was hearsay.

(R.H. 219-227) Petitioner's counsel argued that Flynn's statement to Adcock was an admission against interest, *viz.*, in contradiction of the Government's allegation in the present litigation that it had disclosed all of the bugging directed against Battaglia. FBI Agent Flynn was somebody's agent; clearly he was an agent of the Federal government and his statement made *ante litem motam* which contradicts his principal's assertion later in the litigation is an exception to the hearsay rule. 4 Wigmore: *On Evidence,* 3rd Edition, §§ 1048, 1078.

Petitioner's counsel was prevented from inspecting the file of Agent Johnson's original report which was to become the subject matter of this case and which was filed with the reports of the electronic surveillances under file number 92-152. (R.H. 206-216) Counsel developed an interception of a conversation between Battaglia and his attorney Sobel, who appeared for the defendant as local counsel and counsel of record in this trial. Sobel testified that during the very period of the admitted interception of the conversation between them he had been consulted by Battaglia who was concerned over the possibility of controversey with Greenwell. The Trial Court was strenuously disinterested in the intrusion into the attorney-client relationship: "It shows overhearing what a client and his attorney say, but what materiality?" (R.H. 165). The Court of Appeals was not much more moved:

> "* * * The Government's witnesses, credited by the court, and the logs of what was overhead show an absence of any connection between what was overheard and the indictment and the trial of Battaglia. Surveillance of a conversation between a lawyer and his client may be a particularly obnoxious type

of surveillance, but it still may have nothing to do with the case on trial." Appendix A *infra* 10a.

The Court would not hear evidence which was directed to any but the one question that it viewed as controlling: Was the evidence to be produced at trial by the Government developed from the illicit bugging which the Government admitted?

2. *The issues of law which deserve review.*

(a.) The petitioner Battaglia is entitled to a hearing at which he has a fair opportunity to establish illicit bugging which the Government has not disclosed; certiorari should be granted to set the proper scope of hearings where the Government admits some illicit bugging.

The Government was successful in restricting the hearing and indeed precluding the exploration of the very sorts of factual matters which this Court has required the Government to disclose, as we have indicated above. The crux of the Government's contention in regard to the scope of the hearing was set out in its written reply to the defendant's motion (C.T. 69) and its memorandum on the scope of the hearing (C.T. 75). Relying on *Nardone* v. *United States*, 308 U.S. 338 (1939), the government argued that the scope of the hearing was limited to the government's concessions, and that the defendants could not at the hearing attempt to develop other undisclosed bugs unless they first established the existence of such bugs. Aside from the circularity of such reasoning, it represents a misplaced reading and reliance on *Nardone*. Mr. Justice Frankfurter's opinion makes perfectly clear that the rule is a rule of judicial administration; it was designed to prevent an exploration of the government's evidence before trial. (*Id.* at 342) That rationale, of course, has no applicability here. The government, even

on its theory, was obliged substantially to disclose its evidence and show it to be untainted by its *admitted* taps. Furthermore, the blocked inquiries related not to the substantial evidence to be produced at the trial, but to the techniques, identity and activity of government police agents who were not, and indeed could not have been, called at the trial. The other important rationale is that to give a hearing in every case where there was a naked claim of eavesdropping activity would " * * * subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers." (*Id.* at 342) But that rationale is entirely without relevance in this case. The government had admitted its trespass installation of trespass microphones in violation of the Fourth Amendment. This was no interruption of orderly judicial proceedings to see whether the government had possibly indulged in some wickedness; the government had admitted its wrongdoing but insisted that its inventory of the wrongdoing was binding and conclusive upon the defendant. It is understandable that the government should concentrate on its repentance and wish to minimize its wrongdoing.

As this Court noted in its recent decision in the case of *Berger* v. *New York*, 388 U.S. 41 (1967), the peculiar nature of the violation of Constitutional rights involved in electronic eavesdropping requires an especially close scrutiny of the procedures devised by the courts to deal with it. We submit that this is not only true as to the procedures involved in the authorization of such activity (*Berger* v. *New York, supra; Osborn* v. *United States*, 385 U.S. 323 [1966]) but also, we urged, ought to be true as to the hearings held

in connection with the Government's having illicitly engaged in such activity. We respectfully urge that the very questions which petitioner was not permitted to explore represent a bedrock minimum of what the defendant is entitled to develop at a hearing in order to protect his rights: the name of the person who authorized the installation, the identity of the person who made the installation, and the exact location of the devices which were installed. Armed with this information, counsel representing the victim of an electronic bugging will be able to fully and fairly test in the adversary crucible the completenes and candor of the Government's disclosures. Once the Government has admitted its wrongdoing, the defendant should not be tied to the Government's self-serving inventory but should be permitted to pursue the matter fully.

(b.) The Government's electronic intrusion into the relationship between Battaglia and his attorney Sobel, whom he had consulted concerning the subject matter of the investigation and who represented him on this indictment presumptively requires reversal; certiorari should be granted to clarify the decision of this Court in *United States* v. *Hoffa*, 385 U.S. 293 (1966) and to protect the integrity of the attorney-client relationship.

The Court of Appeals treated the intrusion of the attorney-client relationship thus:

> "* * * The Government's witnesses, credited by the court, and the logs of what was overheard show an absence of any connection between what was overheard and the indictment and the trial of Battaglia. Surveillance of a conversation between a lawyer and his client may be a particularly obnoxious type of surveillance, but it still may have nothing to do with the case on trial." Appendix A, *infra*, 10a.

The District Court, however, had only one interest and that was whether or not the Government's evidentiary case was developed from the bugging:

> "Mr. Cunningham: May I point out this was not a hearing between the two; this was only a hearing of what Battaglia said.
>
> The Court: I understand it's what Sobel said. It is what it says it is, and that's it. It's in. Has no materiality at this point." (R.H. 165)

It is perfectly clear from the Court's remarks (R.H. 252-254) at the close of the hearing when the motion was denied that the Court was solely concerned with the question of whether the Government's case was derived from the electronic bugging. At the outset we should note that there is not the faintest suggestion anywhere in the record that Mr. Sobel was engaged in any improper activities of any sort. It is certainly true that the intrusion into the attorney-client relationship did not turn up the Government's case, but Sobel testified that at the very time the Government was doing its bugging and at the locations which were bugged, he had conversations with Battaglia concerning Battaglia's relationship with the complainant Greenwell and the controversy which was later to ripen into this case.

We respectfully submit that despite the fact that in its affirmance in *United States* v. *Hoffa*, 385 U.S. 293 (1966), this Court was at pains to point out that "* * * if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective. Cf. *Black* v. *United States* . . ." (*Id.* 307). *Hoffa* has been widely misunderstood to suggest that selective intrusions into the confiden-

tial relationship between lawyers and clients will be found harmless by this Court. It is of course no argument for the Government to assert that it did not intend to pry into the lawyer-client relationship. Surely the Government and not the defendant must bear the burden when the Government's wrongdoing goes further than it had originally contemplated. An attorney legitimately practicing his profession and conferring with a client, whether or not that client is on the organized crime list, is entitled, as is his client, to feel secure from the intrusive snooping of the police. As long as the strongest sanction to be applied is the characterization of the conduct as "obnoxious" there is no reason to believe the police will be discouraged from such activity. Both *Osborn* v. *United States,* 385 U.S. 323 (1966), and *United States* v. *Hoffa,* 385 U.S. 293 (1966) were scrupulously limited by the Court to their special circumstances. They may well not have been generally so understood by some police agents. We respectfully urge this Court to vindicate that meaningful part of the right to counsel which involves confidentiality by granting the writ of certiorari and reversing the conviction.

(c.) This Court in the exercise of its powers of supervision over the administration of justice in the Federal Courts should bar the prosecution of any offense which the Government has sought to discover by illicit electronic intrusions into a man's home.

In our motion filed immediately after we were advised of the existence of electronic surveillances (Notice of Motion, January 13, 1967, C.T. 63-64) and in our brief in the Court of Appeals (Point III, C, page 69), we urged that the indictment be dismissed with prejudice because of the Government's conduct. The Court of Appeals, looking wistfully back to the days of *People* v. *Defore,* 242 N.Y. 13, (1926), rejected our contention. (Appendix A, *infra* 10a-11a.)

Electronic eavesdropping is hardly a constable's blunder. It is by and large an almost wholly undetectable destruction of a man's privacy. By the grace of the Department of Justice, the existence of the surveillance in this and similar cases has been disclosed. It must surely, however, be too late to argue that the Founding Fathers intended the liberty of our citizens to be entrusted to the unerring good faith, restraint and moderation of policemen and prosecutors.

Though Battaglia's counsel continued on a number of occasions to return to the broader questions and referred to Amendments ranging from the Third to the Ninth, the Court typically ignored these contentions and focused on the search and seizure question, e.g., R.H. 140. While the suppression of evidence which is the result of illegal activity on behalf of the government is a remedy, it is by no means the only remedy. Where the Federal government destroys a defendant's rights under the Fifth Amendment by compelling him to testify in the face of a claim of the privilege against self-incrimination, the government is barred from prosecuting him; it must confer "absolute immunity" against further prosecution for the offense to which the question relates. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), at 585, 586. The vitality and correctness of *Counselman* in stating the Federal standard was recently affirmed in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965). Though as a matter of abstract logic the sanction for the violation of the Fifth Amendment right to silence could be a mere prohibition of the use of evidence derived from that violation, that is, a requirement on the government to show an untainted source for its case [cf. *Malloy* v. *Hogan*, 378 U.S. 1 (1964) and *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964)], neverthe-

less it is firm Constitutional doctrine that a Federal invasion of the Fifth Amendment privilege bars prosecution in the area of the invasion, whether or not the case comes from an independent source. We think that that is the appropriate remedy here. The intrusions into Battaglia's office, and more importantly into his home, over so long a period of time, offend against his rights to be free of a general search, *Berger* v. *United States,* 388 U.S. 41, 59 (1967), and destroyed the privacy and sanctity of the home and marriage which the Third, Fourth, Fifth and Ninth Amendments taken together set beyond the reach of state power. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). We submit that only a flat bar to prosecution will be an effective deterrent and an adequate vindication of the defendant's rights against electronic bugging. The special vice of such snooping is that, unlike the search by police for tangible objects, the victim is unaware of the violation of his rights. We submit that where the defendant is so peculiarly at the mercy of the government to inventory its own wrongdoing, the rule of the immunity cases rather than the rule of the search cases is the proper and effective one. In this case the bugs were maintained well into the period of the events covered by this investigation, and maintained with a specific view to prosecuting Battaglia under the very statute for which he stood trial. He had been the target of Agent Johnson's investigations since before 1961 and sometime prior to June 1963 his name appeared on an official list which came to Agent Johnson's hands (R.H. 216-219).

We respectfully ask this Court to require the Solicitor General to deliver to it all of the logs of the admitted eaves-

dropping, which by agreement of all counsel have been in the custody of the Department of Justice.

An examination of those logs will demonstrate the extensive and offensive intrusion into the purely personal lives of the defendant and his wife which, according to the Department of Justice, served no law enforcement purpose. Only a radical remedy can effectively restrain police agents from their prurient electronic interests.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
ROBERT KASANOF
Attorneys for Petitioner Battaglia

December 1967

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,784

CHARLES JOSEPH BATTAGLIA, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

[October 4, 1967]

On Appeal from the United States District Court for the District of Arizona

Before: MADDEN, Judge of the United States Court of Claims, and MERRILL and KOELSCH, Circuit Judges.

MADDEN, Judge:

Battaglia, who will be hereinafter sometimes referred to as the defendant, appeals from his conviction on January 20, 1967, of a violation of § 1951 of Title 18, United States Code, the statute known as the Hobbs Act.[1] He had been indicted,

[1] The parts of § 1951 pertinent to this case are:
affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any per-

together with Spinelli and Estes, on March 5, 1965, on a charge of having interfered with interstate commerce by having, by threats, obtained from one Greenwell space in a bowling alley operated by Greenwell for a coin-operated pool table and a share of the profits from its operation. Spinelli and Estes were tried separately from Battaglia and were acquitted on December 9, 1965. Battaglia obtained five continuances on account of illness. His trial began on January 19, 1967, and he was convicted on January 20.

Battaglia's enterprise, Tucson Vending Co., was engaged in placing vending machines, pinball machines and other such equipment in places such as bowling alleys under arrangements with proprietors to share the profits from the machines. In June, 1963, such an arrangement between Battaglia and Greenwell was initiated. Some machines were installed and proved profitable. Battaglia agreed with Greenwell that he would indemnify Greenwell against any liability of Greenwell to another company, Canteen, with which Greenwell had a contract about a cigarette vending machine, and Greenwell then agreed to let Battaglia install additional machines, but refused to sign an exclusive con-

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son or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

"(b) As used in this section—

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any territory or Possession of the United States; all commerce between points within the same state through any place outside such State; and all other commerce over which the United States has jurisdiction.".

tract with Battaglia until the expiration of the Canteen contract.

One Gumbin was the lessee from Greenwell of the cocktail lounge in the premises of Greenwell's bowling alley. A coin-operated pool table in Gumbin's cocktail lounge had proved profitable, and Greenwell and Gumbin agreed, in December, 1963, to place another such pool table in the bowling alley, and the table was obtained from a source other than Battaglia's company. A few days later, Battaglia angrily complained to Greenwell that he and Greenwell had an agreement that such machines would be obtained only from Battaglia. Greenwell denied that there was such an agreement. Battaglia reminded Greenwell what had happened to one Serota. They both knew that he had been murdered and his body had been found in the trunk of his automobile. Battaglia said, "You have a very attractive wife. I know which way she goes home, and I'm sure you don't want anything to happen to her, and you don't want anything to happen to your factory."

The argument quieted down. Battaglia offered to buy the offending pool table from Gumbin, Gumbin refused to sell it. Soon thereafter, in the night, the felt on the pool table was slashed. Greenwell telephoned Battaglia and accused Spinelli and Estes, Battaglia's men, of having slashed the table. Battaglia answered, "If you think the slashing of the cover is so bad, how would you like to have a bowling ball through the slate?" The effect of such an occurrence would be serious and almost irreparable damage to a pool table.

Greenwell told Gumbin to remove the pool table from the bowling alley. He replaced it with a table obtained from Battaglia's company.

The parties stipulated that both the pool table which was removed from Greenwell's bowling alley and the table supplied by Battaglia, which replaced it, had been shipped to Tucson, Arizona, from outside that state.

I

The Interstate Commerce Question.

Battaglia's appeal asserts a failure of proof that there was an obstruction or an effect upon interstate commerce as required by the Hobbs Act. Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat, 1, 6 L. Ed. 23 (1824), said of the Commerce Power vested in Congress by the Constitution:

> "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution."

In spite of this expansive language of the Chief Justice in Gibbons v. Ogden, the extent of the power of Congress under the commerce clause was extensively litigated and remained unclear until the 1937 decision of the Supreme Court in the case of National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1. The opinion of Chief Justice Hughes in that case validated the power of Congress to regulate any activity which affected interstate commerce. Two years later, in the case of National Labor Relations Board v. Fainblatt, 306 U.S. 601, 607, Mr. Justice Stone, in answering Fainblatt's argument that Congress could not regulate activities which had only a small effect on interstate commerce, wrote:

> "Examining the Act in the light of its purpose and of the circumstances in which it may be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected, more than that to which the courts would apply the maxim de minimis."

Since the rendition of the foregoing decisions the only question left for litigation has been, not the question of the constitutional power of Congress, but the question of the intent of Congress to include, or not to include, within the reach of a statute the kind of activity involved in the litigation. In United States v. Stirone, 361 U.S. 212, 215, the Court said that the Hobbs Act speaks in "broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'"

The defendant urges that, although the pool table here involved which his alleged extortion caused to be removed from use at Greenwell's bowling alley had been shipped in interstate commerce to a dealer in Tucson before it was acquired and installed by Greenwell in his bowling alley, its interstate journey had ended before it was acquired by Greenwell, and therefore later events relating to it did not affect interstate commerce. In National Labor Relations Board v. Reliance Fuel Oil Corp., 371 U.S. 224, the Court held to the contrary as to the Labor Relations Act.[2]

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[2] See Wickard v. Filburn, 317 U.S. 111, 124, to the effect that earlier doctrine requiring that the economic effect of conduct on interstate commerce must be direct in order to bring the conduct within the Commerce Power of Congress is no longer valid.

In United States v. Stirone, 168 F. Supp. 400, 496, the Court said:

> "... a deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs and affects interstate commerce as surely as though the same act had cut off the supply at its source."

We find no error in the district court's interpretation of the Hobbs Act or its application to the facts of this case.

II

The Cross-Examination of Mrs. Greenwell

Mrs. Greenwell was a witness for the prosecution, who by her testimony supported her husband's testimony that he had requested her to drive home after work by a better lighted, though longer, route than she had been using, and to telephone him when she started home; that upon her insistence on knowing the reasons for those requests, he had told her of the defendant's threatening statement about her. The defendant on cross-examination questioned her about her going alone to a dog track and to dances. When the court questioned the materiality of the subject of these questions, counsel said in effect that further questioning might tend to show that Greenwell was moved by jealousy, rather than by fear for his wife resulting from the defendant's threats. The court indicated that it thought the questions were irrelevant, but expressly gave counsel permission to pursue the line of questioning. Counsel then examined about other

matters, then returned to the subjects of the dog track and dances, asking the witness whether during the period January, 1964, to April, 1964, she went to the dog track or went dancing. It will be remembered that the trial took place in April, 1967. The witness answered that she did not remember whether she had or had not gone to the dog track or gone dancing during that period.

We see nothing in the defendant's complaint that he was inproperly restricted in his cross-examination of Mrs. Greenwell. He was given express permission to pursue the inquiry, and did so. His further questions produced no answers which made further cross-examination promising for him, and he dropped the subject. He urges in his brief that he "quite reasonably . . . in view of the court's evident hostility to the line of questioning, moved to something else rather than risk the ire of the trier of fact." But, having moved to something else, he later made use of the express permission which the court had given him and returned to the same line of cross-examination and, so far as the record shows, exhausted it. In effect he is now urging that once a trial judge has erroneously indicated that he thinks a line of questioning is irrelevant, he has committed reversible and incurable error, even though he immediately thereafter changes his ruling and the line of questioning is followed, without interruption, to its end. We are not willing to adopt such a wasteful and improvident rule.

III

The Electronic Surveillance Problem

On January 11, 1967, eight days before the trial began, a Department of Justice attorney disclosed to the court and to counsel for the defense that extensive electronic surveillance of the defendant had been carried on by the department. The defendant made a motion to suppress the Government's evidence, and the court set January 16 as the date for a hearing on the motion. At that hearing government counsel stated the dates and places at which electronic surveillance, by means of microphones installed by trespass and involving Battaglia, had been carried on. All of the logs of the conversations in which Battaglia was a participant, or in which he was mentioned in conversations, were given to the court and to counsel for the defense. The logs consisted of notes made by government agents who listened to the conversations picked up by the secret microphones and transmitted by radio waves to receiving devices installed in the government headquarters, where agents listened to them and made notes of what they regarded as significant. Several attempts were made to record on tape what came to the receiving sets, but because of mechanical failures no intelligible tapes were obtained.

At the hearing on the motion to suppress evidence, defense counsel argued that "... at the very least, the Government should proceed to show that its lawlessness has not infected this indictment"; ". . . they must show an independent train of evidence bringing about this indictment"; "the Government must prove an independent source of its

case. This is the burden the Government has put upon itself by violating the law." The inference from the above quoted statements of defense counsel is that if the Government could persuade the court that what the Government had learned by its extensive surveillance of Battaglia had no connection with the obtaining of the indictment for extortion against Battaglia, and produced no leads to the evidence which would be used at his trial, there would be nothing to suppress.

The Government produced the F.B.I. agent, Fauver, who testified as to how the case against Battaglia originated and was developed. He testified that in April, 1964, he was assigned to the investigation as a result of Greenwell's having told the Tucson Police Department, in March, 1964, of Battaglia's conduct and threats. Fauver interviewed Greenwell. Greenwell told him of Chapman and Bierschbach, who had information about the pertinent events. Chapman told Fauver about Gumbin and McCormick. Testimony at the grand jury investigation caused the Government's special prosecutor, Mr. Corey, to direct Fauver to interview four other potential witnesses. On his own initiative he interviewed one other person, because that person's establishment had been bombed. The Government thus accounted for the origin and development of the case which it intended to present at Battaglia's trial. Defense counsel, at the suppression hearing, cross-examined the Government's witnesses in an effort to induce the court not to believe them. His examination of the logs, which had been in his possession for several days, discovered nothing which connected the prosecution of Battaglia for extortion with the surveil-

lance. He argued, and in his brief argues, that testimony of certain government witnesses as to the absence of any connection between the trespassory surveillance and the case against Battaglia was so implausible as to be unbelievable. But the court believed the testimony and that was within its province as the trier of fact.

The defendant argues that included in the extensive surveillance of his conversations were conversations with a Mr. Soble who was, at the time of the surveillances, his legal counsel. These surveillances were voluntarily disclosed by the Government. The Government's witnesses, credited by the court, and the logs of what was overheard show an absence of any connection between what was overheard and the indictment and the trial of Battaglia. Surveillance of a conversation between a lawyer and his client may be a particularly obnoxious type of surveillance, but it still may have nothing to do with the case on trial.

The defendant urged the trial court and urges this court to decide that when there has been illegal surveillance by the Government, or at least when that surveillance has been as extensive as it was in this case, "only a flat bar to prosecution will be an effective deterrent and an adequate vindication of the defendant's rights against electronic bugging." We are urged to be the first to decide that if the constable's blunder[3] is electronic surveillance, the criminal is, *ipso facto* and irretrievably, to go free. The Court said, in Mapp v. Ohio, 367 U.S. 643, 653, ". . . time has set its face against what Wolf[4] called the 'weighty testimony' of People v. Defore . . ." But in all the situations in which

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[3] See Cardozo, J., in People v. Defore, 242 N.Y. 13, 21 (1926).

[4] Wolf v. Colorado, 338 U.S. 25, 31.

criminal convictions have been reversed because of conduct of the prosecuting authority in violation of a constitutional right of the defendant, the reversal left the prosecution free to retry the defendant, omitting the tainted evidence and its fruits, or the forbidden conduct. See, e.g., Payne v. Arkansas, 356 U.S. 560, coerced confession; Mapp v. Ohio, supra, illegal search; Griffin v. California, 380 U.S. 609, compulsion of self-incrimination by comment on failure of defendant to testify. Although the practical result of the reversal may in many cases be that the defendant will not be retried because of a lack of untainted evidence, the fact of the tainted conduct does not, of itself, bestow immunity upon the defendant. Under the doctrine urged by the defendant for application to this electronic surveillance case, there would be nothing which could be omitted or done differently in the second trial. Since the surveillance obtained no evidence and produced no fruits, the second trial would be as vulnerable as the first to a motion to dismiss. We can think of no reason why this violation by the prosecution of a defendant's constitutional rights should be singled out for uniquely drastic treatment.

We therefore reject the defendant's proposed doctrine that extensive trespassory surveillance requires dismissal of a prosecution, even though there is no connection between the surveillance and the indictment and trial.

We return now to the consideration of the question whether the trial court's conclusion that there was, in fact, no connection between the surveillance and the indictment and trial is supportable. We do not find it necessary to resolve the mooted question as to where the burden lies to prove that there was, or was not, some connection. We

assume that the burden was upon the Government to prove lack of such connection. The Government undertook systematically to make that proof. Its witnesses testified that in the preparation of the case they made no use of what had been learned by the illegal surveillance. They presented the logs, which contained nothing that would have been of use in this extortion case. They testified as to how and when and from whom they had obtained their evidence. This was live testimony, subject to cross-examination by the defendant, given by reputable witnesses, and in no sense implausible in its content. The trial court believed the testimony. The testimony of the witnesses, at the trial, to the defendant's threats and their effects upon Greenwell, and to events circumstantially involving the defendant, gave no indication whatever that the testimony had any relation to the electronic surveillance. If that condition of the evidence does not justify the court's conclusion, at the suppression hearing, that the trial would not be tainted by the surveillance, then we are back to the defendant's contention, which we have rejected, that the surveillance *ipso facto* would taint the trial and thus compel dismissal.

We find the proof of extortion adequate.

The defendant asserts other alleged errors. We have considered these assertions and do not find the points involved substantial.

The judgment is affirmed.

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286-161—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 867

CHARLES JOSEPH BATTAGLIA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 383 F. 2d 303.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1967. On October 24, 1967, Mr. Justice Douglas extended petitioner's time for filing a petition for a writ of certiorari until December 2, 1967, and the petition was filed on December 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the act of extortion of which petitioner was convicted affected interstate commerce within the meaning of the Hobbs Act.

2. The government disclosed, prior to trial, that petitioner had been the subject of trespassory electronic surveillance. The times and places of the surveillance were revealed and logs of the monitored conversations were turned over to the court and defense counsel. At a hearing held for the purpose the government established to the satisfaction of the court that the proof which it proposed to present against petitioner at the trial had had an independent origin and development. The remaining questions presented are:

a. Whether the court properly excluded from the scope of the hearing the question as to who had authorized the installation of the eavesdropping equipment;

b. Whether it was material that the monitored conversations included talks, unrelated to the matters charged in the indictment, between petitioner and an attorney who had represented him in certain civil matters;

c. Whether this Court, in the exercise of its supervisory powers, should hold that in consequence of the electronic surveillance petitioner is immune to punishment for his offense, committed during the surveillance, notwithstanding the demonstrated lack of connection between the surveillance and the evidence on which the conviction was based.

STATUTE INVOLVED

18 U.S.C. 1951 (the Hobbs Act) provides in pertinent part:

> § 1951. *Interference with commerce by threats or violence.*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by * * * extortion * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *.
>
> (3) The term "commerce" means * * * all commerce between any point in a State * * * and any point outside thereof; * * * and all other commerce over which the United States has jurisdiction.
>
> * * * * * *

STATEMENT

Following a non-jury trial, in the United States District Court for the District of Arizona, petitioner was convicted on a single-count indictment charging that he and two codefendants, Salvatore Spinelli and Teddy Estes, obstructed and affected commerce, in violation of 18 U.S.C. 1951 (the Hobbs Act), by using

threats of force to secure space in a bowling alley for a coin-operated pool table (1 R. 4–5; 7 R. 314).[1] On February 17, 1967, petitioner was sentenced to ten year's imprisonment and to pay a fine of $10,000 (8 R. 30).

1. In December 1963, Jerome Greenwell, the proprietor of a bowling alley in Tucson, Arizona, and Jack Gumbin, who operated a cocktail lounge on adjacent premises, agreed that Gumbin might install a coin-operated pool table in the bowling alley and that the two would share in the profits (4 R. 82–83, 95; 7 R. 268–269, 276–277). At the time, petitioner was maintaining vending and pinball machines on the bowling alley premises pursuant to a similar profit-sharing arrangement with Greenwell (4 R. 85–93). A few days after the installation of the pool table, petitioner complained to Greenwell that he and Greenwell had an agreement under which such devices would be obtained only from him (4 R. 95–96). When Greenwell denied the existence of any such agreement petitioner "reminded" Greenwell of what had "happened to Serotta"—Louis Serotta, a mutual acquaintance, had been found murdered in the trunk of his automobile (4 R. 84, 97). Petitioner also commented that Greenwell had an attractive wife, that petitioner "kn[e]w which way she [went] home," and that he was sure Greenwell did not want "anything to happen" to her—or to a factory which he owned (4 R. 82, 98–99).

Concerned for his wife's safety, Greenwell sought

[1] Spinelli and Estes were acquitted following a separate trial which preceded that of petitioner (1 R. 99).

to accommodate petitioner by buying Gumbin's pool table for petitioner and replacing Gumbin with petitioner in the profit-sharing arrangement. Gumbin, however, refused to sell the table at the price offered by petitioner, with the consequence that the table remained in the bowling alley under the terms of the original agreement (4 R. 99–100, 107–108; 7 R. 216–218, 279–282). One night the felt surface of the table was slashed with a sharp instrument (4 R. 100; 7 R. 243–244). When Greenwell, in a conversation with petitioner, accused two of petitioner's associates of damaging the table, petitioner said, "If you think the slashing of the cover is so bad, how would you like to have a bowling ball through the slate?" (4 R. 101). As a result of the conversation Greenwell told Gumbin to remove the pool table and it was replaced with one supplied by petitioner (4 R. 102; 7 R. 270–271).

It was stipulated at the trial that the table which was removed had been shipped to Arizona from its place of manufacture outside the State (1 R. 84–87; Pet. 7–8).

2. A week before the trial began, the government disclosed to the court and defense counsel that, at various times during the period 1961–1964, petitioner had been the subject of electronic surveillance conducted by the F.B.I. as part of its continuing investigation of organized crime. The times and places of the surveillance were revealed and the logs of all conversations (overheard in the course of the surveillance) to

[3] Attempts were made to make recordings of the conversations but because of mechanical failures no tapes were obtained (4 R. 21; 5 R. 76, 82–84; 6 R. 241–242).

which petitioner was a party or in which he was mentioned were turned over to counsel and the court (1 R. 69–70; 4 R. 6; 5 R. 20–22; 6 R. 200). The logs consisted of notes made by agents who monitored the conversations and wrote down portions they deemed significant (5 R. 75; 6 R. 157–158, 245).[2] Petitioner moved to suppress the use by the government at the trial of any evidence obtained through this means or which had resulted from leads so obtained (1 R. 63–64). At a pretrial hearing on the motion (volumes 5 and 6 of the record) the government represented to the court, and undertook to prove, that the evidence which it proposed to present against petitioner had been obtained by it independently of the electronic surveillance (5 R. 17–19, 22–23).[3] At the conclusion of the hearing, the court held that the government had satisfactorily established the absence of any connecting link between the proof it proposed to present at the trial and any information received through the electronic surveillance (6 R. 252–254).

At the hearing the government, after advising the court and defense counsel of the names of all witnesses whom it proposed to call at the trial (5 R. 22), produced the F.B.I. agent, Earl Fauver, who had investigated the activities of petitioner which had resulted in the present prosecution (5 R. 24–25). Fauver testified concerning the development of the case against petitioner and how he had come to interview the various witnesses (5 R. 25–30). The agent testi-

[3] This was the burden which the defense contended, and the court held, the government was required to bear (5 R. 5–6, 9, 10, 12).

fied that he was assigned to the investigation in April 1964 as a result of Greenwell's having reported petitioner's conduct and threats to the Tucson Police (5 R. 25–26). Fauver, who during the relevant period was attached to the Phoenix office of the F.B.I. (5 R. 24), testified that he had been unaware during his investigation that electronic surveillance of petitioner had been conducted by the Tucson office; that no F.B.I. agent—connected with that office or any other—had at any time suggested any person for him to interview; and that none of the information gathered by him was to his knowledge in any way connected with the surveillance (5 R. 26–27).[4]

Defense counsel, who had had possession of the logs of the overheard conversations for several days prior to the hearing, was unable at the hearing to point to anything in the logs that connected the present prosecution with the surveillance.

ARGUMENT

1. There is no merit in petitioner's contention that the act of extortion of which he was convicted did not affect interstate commerce within the meaning of the Hobbs Act (Pet. 7–10). As this Court observed in *Stirone* v. *United States*, 361 U.S. 212, 215, the Hobbs Act "speaks in broad language, manifesting a pur-

[4] Kermit Johnson, the senior resident F.B.I. agent in Tucson, under whose supervision some of the electronic surveillance was conducted (5 R. 73–74; 6 R. 236–237, 240), testified, in corroboration of Fauver, that he had never informed Fauver of the maintenance of the surveillance (5 R. 86). Like testimony was given by James Cornett, an investigative clerk in the Tucson office of the F.B.I., who had also participated in the surveillance (6 R. 236–241, 246–249).

pose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" In this case, the evidence established that the pool table which petitioner forced Greenwell to remove from his bowling alley had been shipped to Arizona from its place of manufacture outside the State. That the owner's immediate supplier was an Arizona dealer does not undermine the conclusion that commerce was affected. "[A] deliberate act which tends to prevent articles from being used once they have reached their destination after being shipped in interstate commerce dams up the stream of commerce and delays, obstructs and affects commerce as surely as though the same act had cut off the supply at its source." *United States* v. *Stirone,* 168 F. Supp. 490, 496 (W.D. Pa.), affirmed, 262 F. 2d 571 (C.A. 3), reversed on other grounds, *Stirone* v. *United States,* 361 U.S. 212.[5] Cf. *Nick* v. *United States,* 122 F. 2d 660, 668 (C.A. 8), certiorari denied, 314 U.S. 687

[5] Petitioner's reliance on the dissenting views of Judge Hastie in the *Stirone* case, 262 F. 2d at 579 (quoted at pages 8–10 of the petition), is misplaced. Judge Hastie's comments had reference to the alternative basis on which the question of Stirone's guilt or innocence had been submitted to the jury (discussed in the majority opinion at pages 574–575)—the theory that the requisite impact of the defendant's activities on interstate commerce could be found from the fact that the ready-mixed concrete which the extortion victim manufactured was *to be used* in the construction of an as-yet non-existent mill, which, when built, would manufacture articles that *would be* shipped interstate. Nothing like the situation to which Judge Hastie's remarks were addressed is involved in this case, which involved an existing article in existent commerce.

(extortion from motion picture film exhibitors; "[i]f exhibitors are prevented or seriously obstructed in exhibiting the films they will not buy them. If exhibitors will not buy the films they will not be shipped in interstate commerce"). See, also, *National Labor Relations Board* v. *Reliance Fuel Corporation*, 371 U.S. 224.

Viewed in isolation, petitioner's threats of violence against the proprietor of a single bowling alley, concerning a single coin-operated pool table in his establishment, undoubtedly had very limited impact on the flow of interstate commerce. But this Court has recognized that whether or not a practice may be deemed to affect commerce "is not to be determined by confining judgment to the quantitative effect of the activities immediately" at hand and that "[a]ppropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 648. Similarly, it is apparent that the illegal business methods which petitioner was here shown to have employed, if left unchecked, could have a significant impact.

2. Petitioner's claim that the trial court improperly restricted the scope of the hearing on the motion to suppress (Pet. 11–20) is unsound. The ultimate issue for resolution was whether the evidence which the government proposed to present against petitioner was the fruit of the government's acknowledged sur-

veillance or whether "its proof had an independent origin." *Nardone* v. *United States*, 308 U.S. 338, 341; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392; *Wong Sun* v. *United States*, 371 U.S. 471, 487–488. Through the testimony of Agent Fauver the government affirmatively showed that its case against petitioner—including its leads to the witnesses through whom the evidence was to be presented—had originated independently of the eavesdropping. Since the proposed testimony was not the fruit of the illegal eavesdropping the question of who had authorized the installation of the eavesdropping equipment—which petitioner contends he was erroneously precluded from exploring (Pet. 16)—was irrelevant.[6]

We also dispute petitioner's claim that the "scope of counsel's inquiry was sorely limited" (Pet. 16). Counsel was not "blocked from an inquiry into the physical nature of the installation * * * of the surveilling microphones" (Pet. 16). The essential nature

[6] In disclosing the surveillances, the government had represented to the court that no recordings had been made (1 R. 70; 4 R. 21) and Agent Johnson, who was generally familiar with the monitoring and under whose supervision some of it had occurred, so testified at the hearing (5 R. 76, 80–84). The agent acknowledged that efforts had been made to record the conversations, but he stated that, due to mechanical failures, the attempts had not been successful (5 R. 82–84). While petitioner argues that the latter testimony of the agent was false and implausible (Pet. 13), it is to be noted that the testimony was corroborated by James Cornett, a clerk in the F.B.I. Tucson office who had participated in the monitoring (6 R. 236, 238–241) and who likewise referred to the malfunctioning of the recording equipment (6 R. 241–242).

of the eavesdropping equipment (microphones, amplifier, and connecting wires) was established (5 R. 75–76).[7] Nor was counsel foreclosed from inquiring into the "identity of the person who made the installation[s]" (Pet. 20). This matter was developed at the hearing and the name of the individual was revealed (5 R. 99–103; 6 R. 139, 243, 251–252). Nor was counsel barred from inquiring into whether surveillances other than those admitted by the government had been conducted.[8] The court specifically invited counsel to interrogate Agent Johnson (the senior resident

[7] Correctly deeming the matter immaterial, the court accepted as true for purposes of the decision counsel's expressed belief and offer to attempt to prove that the wires used included telephone company lines (6 R. 182–183, 251–252).

[8] The defense offered to prove at the hearing through one Addock, a former Tucson police officer, that an F.B.I. agent who had died before the hearing had once told him that electronic eavesdropping equipment had been installed in an office of petitioner's company (located at 3533 East Speedway in Tucson) other than the offices of the company in which the government had acknowledged placing such equipment (6 R. 219, 221–224). The proffered testimony was excluded as hearsay (6 R. 224–227). Petitioner contends that this ruling was error, arguing that the testimony should have been received under the exception to the hearsay rule which permits the reception of hearsay declarations "against interest" (Pet. 16–17). However, the exception to the hearsay rule on which petitioner relies applies to statements against interest "of a pecuniary character" (*Donnelly* v. *United States*, 228 U.S. 243, 273) and is thus inapposite. Significantly, although defense counsel stated to the court that he believed he could establish through a living witness—one Snell, a former employee of the F.B.I., who had installed the eavesdropping equipment—that such equipment had also been installed at the above-mentioned Speedway address (6 R. 182–183), and although the court indicated it would admit such testimony if counsel wished to call Snell (6 R. 251–252), counsel chose to forego the opportunity to do so (6 R. 252).

agent at the Tucson F.B.I. office, where the monitoring was carried out) on this matter, but counsel declined to do so stating that he did not wish to be limited by the witness' "knowledge" and that there might be someone with "superior knowledge" (5 R. 98).[9]

The court did not abuse its discretion in refusing to permit defense counsel to explore the F.B.I.'s confidential files—either to search for evidence that surveillances of petitioner other than those admitted had been made or for any other purpose (see Pet. 17). Since the government had represented at the outset that it was producting the logs of all conversations in which petitioner had participated and petitioner had failed to establish that there was any reason to believe that other conversations in which petitioner participated were overheard, there was no reason for the district court to permit defense counsel to rummage through the government's files. Moreover, as stated above, the government affirmatively proved at the hearing that its case against petitioner had originated and been developed independently of any electronic surveillance.

[9] While it is true that the court ruled at one point in the hearing that the place at which a particular monitored conversation had taken place was immaterial (6 R. 169) (see Pet. 16), it was apparent from the information disclosed by the government where each conversation had occurred. The information disclosed included the dates on which and the places at which the several surveillances had occurred and no two surveillances had been conducted contemporaneously (1 R. 69; 5 R. 21–22). It was thus apparent from the dates on the logs where each conversation had taken place.

3. Also without merit is petitioner's claim that his conviction is tainted because the monitored conversations included talks between him and an attorney (Pet. 20–22). Although the attorney, Joseph Soble, did represent petitioner in connection with the present criminal case from the time of the filing of the indictment, in March 1965, till the fall of that year (6 R. 230–232),[10] no conversation between the two during that period was monitored; indeed, no electronic surveillance of petitioner was conducted during that period. Soble, who had represented petitioner and his company in various civil matters in 1963 and 1964 (6 R. 228–230), testified that in the early part of 1964 he had a conversation with petitioner in which petitioner had told him of a "big argument" he had had with Greenwell (6 R. 233)—an apparent reference to the dispute between the two referred to in the Statement (p. 4, *supra*). However, the earliest date in 1964 during which petitioner was subjected to surveillance was June 18, 1964 (1 R. 69; 5 R. 21), and defense counsel was unable to point to any log of a conversation between petitioner and the attorney which referred either to this conversation or to any other pertinent matter.

Petitioner concedes that the intrusions in issue "certainly * * * did not turn up the Government's case" (Pet. 21) and he does not dispute the court of appeals' observation that the evidence at the hearing showed "an absence of any connection between what

[10] Soble did not represent petitioner at the trial.

was overheard and the indictment and the trial of Battaglia" (Pet. App. A 10a; Pet. 20). This being so, the instrusions are without relevance.

4. Petitioner's final contention—that this Court, in the exercise of its supervisory powers, should direct that the indictment be dismissed (Pet. 22–24)—is also unsound. Commencing with *Weeks* v. *United States*, 232 U.S. 383, and continuing to the present day, the method by which the Court has enforced constitutional restraints on law-enforcement officials has been the rule of exclusion—denying to the prosecuting authority the benefits of improperly obtained evidence. Where there is no connection (direct or indirect) between the improper activity and the evidence proposed to be presented, there is nothing to suppress. No sound reason exists why this case should be singled out for the uniquely drastic treatment proposed by petitioner. Cf. *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345; *Hoffa* v. *United States*, 387 U.S. 231.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968